IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

MONDAY, THE 20TH AUGUST 2007 / 29TH SRAVANA 1929

WP(C).No. 34330 of 2005(J)

MC.77/1991 of SUB DVL.MAGISTRATE, ALAPPUZHA

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PETITIONER:

VAPPI, CHERUVELITHARA, ERANMALLOOR MURI,
EZHUPUNNA VILLAGE, CHERTHALA TALUK.

BY ADV. SRI.P.SANKARANKUTTY NAIR
SRI.T.V.AJAYAKUMAR
SRI.K.SANDESH RAJA

RESPONDENTS:

1. STATE OF KERALA , REPRESENTED BY PUBLIC PROSECUTOR

2. THE SUB DIVISIONAL MAGISTRATE,
ALAPPUZHA.

3. OMANAKUTTY AMMA, THARAPPALLIYIL,
ERAMALLOOR, CHERTHALA.

4. JAYASREE, D/O.OMANAKUTTY AMMA,
THAMARAPPALLIYIL, ERAMALLOOR, CHERTHALA.

5. VIJAYALAKSHMI, D/O.OMANAKUTTY AMMA,
THAMARAPPALLIYIL, ERAMALLOOR, CHERTHALA.

BY ADV. SRI.D.SOMASUNDARAM
GOVERNMENT PLEADERN SRI.K.S. SIVAKUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 20/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXTS:

EXT.P1: TRUE COPY OF THE FINAL ORDER DATED 21-6-1993

EXT.P2: TRUE COPY OF THE JUDGMENT OF THE HON'BLE HIGH COURT DATED 7-4-2004

EXT.P3: TRUE COPY OF THE PETITION DATED 14-2-2005

EXT.P4: TRUE COPY OF THE REPORT OF THE TAHSILDAR ALONG WITH THE SKETCH DATED 1-3-2005

EXT.P5: TRUE COPY OF THE PETITION FILED BEFORE THE 2ND RESPONDENT DATED 17-3-2005

EXT.P6: TRUE COPY OF THE OBJECTION DATED 7-10-2005

EXT.P7: TRUE COPY OF THE ORDER NO. F. 1224 OF 2OO5 DATED 11-1-2006

EXT.P8: A TRUE COPY OF THE ORDER NO.P.1224 OF 2005 DATED 11-1-2006

EXT.P8: TRUE COPY OF THE ORDER OF SUB DIVISIONAL MAGISTRATE, ALAPPUZHA

RESPONDENTS EXTS:

R3(A): TRUE COPY OF THE SALE DEED NO. 1337 OF 1972

EXT.R3B: TRUE COPY OF THE OBJECTION FILED BY RESPONDENTS BEFORE THE 2ND RESPONDENT

V. RAMKUMAR, J.

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W.P.C. No.34330 of 2005

and

Crl.R.P. No. 2604 of 2006

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Dated, this the 20th day of August 2007

JUDGMENT

As agreed to by both sides, the Writ Petition as well as the Crl.R.P. are heard together.

2. This Writ Petition as well as the Crl.R.P. arise out of proceedings sought to be initiated under Sec. 133 Cr.P.C. in chapter 10 B Cr.P.C. As Ext.P3 complaint dated 14-2-2005 the 5 applicants therein who are the petitioners in the Writ Petition and the petitioner in Crl.R.P. 2604 of 2006 moved the Sub Divisional Magistrate, Alappuzha alleging obstruction to a pathway in the form of reduction in the width of the same which according to the applicants should have a width of 12 links. The grievance of the Writ Petitioners is that instead of passing a conditional order under Sec. 133 Cr.P.C. the Sub Divisional Magistrate issued summons to the opposite party. Subsequently, the Sub Divisional Magistrate passed Ext. P7 order

dated 7-10-2005 in Malayalam and Ext.P8 order dated 4-1-2006 in English in his capacity as Revenue Divisional Officer and Sub Divisional Magistrate respectively holding inter alia that since the pathway in question is a private pathway he has no jurisdiction to proceed with the matter. Since Exts.P7 and P8 orders were purportedly passed as final orders, besides challenging them in the Writ Petition, the petitioners have filed Crl.R.P. 2604 of 2006 as well, by way of abundant caution. With regard to the western segment of the same pathway, there was an earlier mass petition filed before the Sub Divisional Magistrate on 25-11-1991 alleging that the original pathway having a width of 12 links and which was subsequently shifted southwards for the purpose of convenience to avoid a bisection of the property into two, was not having the requisite width of 12 links this would amount to obstruction within the meaning of Sec. 133 Cr.P.C. As per Ext.P1 order dated 21-6-993 the Sub Divisional Magistrate rejected the contention of the then adjoining owner V.p. Fakrudeen that the reduction in the width of the pathway would not amount to obstruction within the meaning of Sec. 133 Cr.P.C.

and directed the said Fakruden to immediately remove the obstruction within 15 days of the date of the receipt of final order passed in those proceedings. Challenging the said order the said Fakrudeen had moved the Sessions court, Alappuzha by filing Crl.R.P. 58 of 1993. Eventhough the learned Sessions Judge confirmed the finding of the Sub Divisional Magistrate that the pathway in question as shifted was a public pathway, the Sessions Judge was of the view that it was beyond the jurisdiction of the Sub Divisional Magistrate to direct the opposite party to increase the width of the pathway. This part of the order of the learned Sessions judge was challenged by the Writ Petitioners by filing Crl.R.P. 1062 of 1995 before the Court. As per Ext.P2 order dated 7-4-2004 this Court disagreed with the view taken by the Sessions court and restored the order passed by the Sub divisional Magistrate holding that an unjustifiable reduction in the width of the pathway would also amount to obstruction within the meaning of Section 133 Cr.P.C. and that the applicants were justified in moving the Sub Divisional Magistrate. This Court finally ordered that even though the

original pathway which was in existence need not be restored to its original state, the pathway shifted to the southern side of the 17 cents of land held by Fakrudeen should also have the very same width of 12 links and that any reduction in the width of the pathway was liable to be removed. After Ext.P2 order passed by this Court respondents 3 to 5 in the Writ Petition herein and who on the adjacent owners of the eastern segment of the very same pathway had allegedly put up pillars reducing the width of the pathway which runs further to the east of the shifted pathway which was the subject matter of Ext.P2 order. According to respondents 3 to 5 the question as to whether the segment of the pathway running further to the east of the pathway which was the subject matter of Ext.P2 order is a private pathway and the Sub Divisional Magistrate has no jurisdiction to initiate or continue the proceedings under Sec. 133 Cr.P.C. and the appropriate civil court alone has jurisdiction to decide the dispute. It was accepting the said contention that Exts.P7 and P8 orders were passed by the Sub Divisional Magistrate in his capacity as the R.D.O./S.D.M. respectively.

3. There is no dispute that the pathway which is the subject matter of the present dispute is a continuation of the pathway which was the subject matter of Ext.P2 order. When in proceedings which were fought upto this Court it was conclusively held that the western segment of the present pathway was a public pathway, it is puerile for the respondents to contend that the easter segment of the pathway which is a continuation of the said pathway towards the east is not a public pathway but a private pathway. A public pathway which is intended for the use of the public cannot terminate midway without reaching anywhere. Hence the objection raised by respondents 3 to 5 who are also adjacent owners is prima facie untenable. The second respondent Sub Divisional Magistrate was not justified in declining the jurisdiction for the reason that the dispute pathway is a private pathway. In the fitness of things, he could have passed a conditional order under Sec. 133 Cr.P.C. calling upon the obstructors to remove the obstructions or show cause why the conditional order should not be made absolute. The 2nd respondent went wrong in merely issuing

summons to the opposite party. He should have only passed a conditional order in terms of Sec. 133. Hence Exts. P7 and P8 orders cannot stand the scrutiny of a court of law and are accordingly set aside and the 2nd respondent shall proceed on Ext.P3 complaint in accordance with law. It shall be open to the parties to agree for a convenient alignment of the pathway ensuring 12 links width with a view to minimise the inconvenience, if any, experienced by respondents 3 to 5 in the enjoyment of their adjacent property. All endeavour shall be made by the Sub Divisional Magistrate to conclude the proceedings as expeditiously as possible and at any rate within four months of receipt of a copy of this judgment.

These petitions are disposed of as above.

V.RAMKUMAR, JUDGE